IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRI. WRIT PETITION NO.43 OF 2004

Ghanashyam Kanhaiyalal Totala & ors. Petitioners
vs.
The State of Maharashtra & anr. Respondents

Mr.S.S.Ingawale for the petitioners.

Mrs.M.M.Deshmukh, A.P.P. for the State.

Ms.Arti Mahajan for Mr.M.V.Limaye for the respondent no.2.

CORAM : V.R.KINGAONKAR,J.

DATED : 28th July, 2006

P.C.

Heard the learned counsel for the parties and the learned A.P.P. for the State.

2. Rule. Rule made returnable forthwith and heard finally with consent of parties.

3. The petitioners are the original accused against whom the respondent no.2 filed a private complaint case (Regular Criminal Case No.86/2001) in the Court of the Judicial Magistrate (F.C.), Ichalkaranji for offences under Sections 403, 420, 468 read with 34 of Indian Penal Code. The learned Magistrate called for inquiry report under Section 202 of Code of Criminal Procedure after verification of the complaint. The concerned Police Officer sent the report of enquiry under Section

202 of the Code of Criminal Procedure. It was thereafter that again the learned Judicial Magistrate, on request of the complainant's advocate, gave further direction to investigate the complaint under Section 156(3) of the Code of Criminal Procedure. The petitioners challenged the direction issued by the learned Magistrate on 29th October 2001 by filing Criminal Revision Application No. 335/2001. The Sessions Judge, Kolhapur allowed the revision application. The learned Sessions Judge, Kolhapur held that subsequent direction to investigate the complaint under Section 156(3) of the Code of Criminal Procedure was uncalled for and could not have been issued by the learned Magistrate since the cognizance was already taken by him. While quashing such direction, the learned Sessions Judge directed that the report under Section 202 of the Code of Criminal Procedure shall be considered and the learned Magistrate would pass order for issuance of process.

4. It is contended by the learned advocate for the petitioners that such direction could not have been issued by the learned Sessions Judge inasmuch as the discretion of the Magistrate could not be curtailed or superimposed by the Revisional Court. Per contra, it is argued by the learned advocate Ms.Arti Mahajan for the respondent no.2 and the learned A.P.P. that there is no

positive direction to issue process for a particular offence on the basis of the report under Section 202 of the Cr. P.C. and as such the impugned order cannot be faulted with.

5. The impugned order reads as follows:

> "The revision petition is allowed.
>
> The Record and proceedings of Cr.Case no.36/2001 be sent to the concerned J.M.F.C. to pass order of issue process in respect of which the report u/s. 202 of the Cr.P.C. has been made out against the accused."

6. The revision petition was filed against the order of the learned Magistrate whereby the direction was issued to the police for investigation under Section 156(3) of Cr.P.C. and hence the limited issue before the Revisional Court was to examine whether such direction was legal and proper. The learned Sessions Judge was right in holding that the Magistrate had no power to issue such direction under Section 156(3) of the Cr.P.C. for investigation inasmuch as the cognizance was already taken. There cannot be duality of opinion that direction under Section 156(3) of the Cr.P.C. can be issued only when the Magistrate has not considered the complaint for setting the criminal law in motion. The direction to call for report under Section 202 Cr.P.C. by itself would amount to taking of cognizance in

respect of the alleged offence. Obviously, the learned Sessions Judge was right in allowing the revision petition. Still, however, it was improper for the learned Sessions Judge to issue further specific direction that the concerned Judicial Magistrate (F.C.) shall pass order of issuing process in respect of which the report under Section 202 of the Cr.P.C. disclosed commission of an offence. As a matter of fact, the petitioners had not challenged any other order save and except the order pertaining to the direction for investigation under Section 156(3) of the Cr.P.C. The Revisional Court could not have, therefore, travelled beyond the scope of the issue involved. The impugned direction, to issue process on the basis of the report under Section 202 of the Cr.P.C., is unwarranted and will have to be set aside. The Magistrate would be free to take his own decision as regards the issuance of process. His decision and discretion cannot be influenced by the direction of the learned Sessions Judge in this behalf.

7. In the view which I have taken above, the petition is allowed and the direction of the learned Sessions Judge, Kolhapur in the final order is quashed. It is, however, clarified that the learned Magistrate may take appropriate decision regarding the matter of issuance of process as may be deemed proper.

8. Rule is made absolute in the above terms.

. Certified copy expedited.

(V. R. KINGAONKAR,J.)